UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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EVANSTON INSURANCE COMPANY, an Illinois Corporation

Plaintiff,

v.

BRIAN HARRISON, individually and doing Business as KINGDOM OF HARRON PRODUCTIONS, and CHRISTOPHER GELMS, an individual,

Defendants.

No. 2:20-cv-01672 WBS KJN

MEMORANDUM AND ORDER RE DEFENDANTS' MOTIONS TO DISMISS

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This case arises out of a dispute over whether plaintiff Evanston Insurance Company has a duty to indemnify or defend defendant Brian Harrison, individually and doing business as "Kingdom of Harron Productions" ("Kingdom of Harron"), under a commercial general liability insurance policy issued to Kingdom of Harron by plaintiff.

I. Factual and Procedural Background

On March 2-3, 2019, Kingdom of Harron held the "Kingdom of Harron's Edge of Spring Celtic Fantasy Fair" (the "Fair") in Auburn, California. (Pl.'s Compl. ¶ 10 ("Compl.") (Docket No. 1).) Prior to holding the Fair, Kingdom of Harron purchased event insurance coverage ("the Evanston policy") from plaintiff to cover liability arising out of the Fair. (Id.)

The Evanston policy covers Kingdom of Harron for any payments Kingdom of Harron becomes legally obligated to pay as damages due to "bodily injury" or "property damage" occurring at the Fair, and gives plaintiff a "duty and right" to defend any suit seeking those damages, with a policy limit of $1,000,0000 per occurrence ("Coverage A"). (Compl. ¶ 11-12.) It also covers Kingdom of Harron for medical expenses arising out of "bodily injury" caused by accident at the Fair, with a policy limit of $5,000 per person ("Coverage C"). (Compl. ¶¶ 11, 16.) The policy contains multiple exclusions, however.

Coverage A contains an exclusion for bodily injuries or property damage that occurs as a result of an audience member, patron, or customer of the Fair's participation in a contest or athletic event (the "Participation Exclusion"). (Compl. ¶ 15.) It also contains an exclusion for any injuries arising out of any "assault or battery" occurring at the Fair (the "Assault or Battery Exclusion"). (Compl. ¶ 17.)

Coverage C contains an exclusion for medical expenses for bodily injury to any person engaged in physical exercise, games, or athletic contests at the Fair (the "Athletic Activities Exclusion"). (Compl ¶ 16.) Coverage C also contains an

exclusion for any medical expenses arising out of bodily injury that would otherwise be excluded under Coverage A (the "Coverage A Exclusion").

Defendant Christopher Gelms ("Gelms") attended the Fair on March 2, 2019. (Compl. ¶ 18.) Gelms participated in a "tug of war" game at the Fair where participants were made to stand on wooden blocks, and he broke his leg when a boy pushed him off his wooden block. (Id.) On March 20, 2019, Gelms filed a personal injury complaint in Placer County Superior Court for damages against Kingdom of Harron for the injuries he sustained at the Fair ("the underlying action").[1] (Compl. ¶¶ 6, 22.) Kingdom of Harron tendered a defense to plaintiff and requested that plaintiff indemnify it against the claims in the underlying action under the Evanston policy. Plaintiff denied coverage, contending that (1) damages arising from Gelms' injury were excluded under the policy's Participation Exclusion because Gelms was injured while participating in the "tug of war" game; (2) damages arising from Gelms' injury were excluded under the

[1] According to the Complaint, before Gelms filed his lawsuit in state court, Gelms filed a "Claim" in which he alleged that Kingdom of Harron was liable for his injuries. (Compl. ¶ 18.) Kingdom of Harron tendered the Gelms Claim to plaintiff under the Evanston Policy on March 13, 2019. (Compl. ¶ 19.) The complaint does not specify what type of "claim" Gelms filed, but the complaint attached to defendants' motion to dismiss indicates that it was a "Government Claim against Gold Country Fairgrounds." Plaintiff disclaimed coverage for the Claim on April 23, 2019, on the grounds that (1) damages arising from Gelms' injury were excluded under the Evanston policy's participation exclusion, because Gelms was injured while participating in the "tug of war" game; (2) Gelms' medical expenses were excluded under the Evanston policy's participation exclusion; and (3) Gelms' medical expenses were excluded under the Evanston policy's "Coverage A" exclusion. (Compl. ¶¶ 20-21.)

Evanston policy's Assault or Battery Exclusion because of allegations in Gelms' complaint that he was pushed off the wood block upon which he was standing during the tug of war game; (3) Gelms' medical expenses were excluded under the Evanston policy's Participation Exclusion; and (4) Gelms' medical expenses were excluded under the Evanston policy's "Coverage A" exclusion. (Compl. ¶¶ 20-21, 24.)

On August 20, 2020, plaintiff brought this action seeking declaratory relief under 28 U.S.C. § 2201. (See generally Compl.) Plaintiff's complaint alleges that this court has subject matter jurisdiction based on 28 U.S.C. § 1332 because there is complete diversity of jurisdiction between plaintiff and each of the defendants and the amount in controversy exceeds $75,000. (See Compl. ¶ 8.)

Plaintiff's First and Second Claims for Relief seek a declaration that plaintiff has no duty to defend Kingdom of Harron in the underlying action based on the Evanston policy's Participation Exclusion and the Evanston policy's Assault or Battery Exclusion, respectively. (See Compl. ¶¶ 25-32.) Plaintiff's Third, Fourth, Fifth, and Sixth Claims for Relief seek a declaration that plaintiff has no duty to indemnify Kingdom of Harron against the claims in the underlying action based on the Evanston policy's Participation Exclusion, Assault or Battery Exclusion, Athletic Activities Exclusion, and Coverage A Exclusion, respectively. (See Compl. ¶¶ 33-48.)

Defendants have filed identical motions to dismiss plaintiff's complaint on the ground that the court lacks subject matter jurisdiction over plaintiff's claims under Federal Rule of

Civil Procedure 12(b)(1) because no actual case or controversy exists between the parties.[2] (See Def. Kingdom of Harron's Mot. to Dismiss at 1 ("Harron Mot. to Dismiss") (Docket No. 7-1); Def. Gelms' Mot. to Dismiss at 2 (Docket No. 6-1).) Defendants also argue that plaintiffs' claims for declaratory relief fail to state a claim upon which relief can be granted under Rule 12(b)(6) because they are either "moot and improper" or "not ripe for adjudication." (See Harron Mot. to Dismiss at 5-10; Harron Reply at 1-2.)

II. Legal Standard

A. Lack of Subject Matter Jurisdiction

Dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, fails to allege facts that are sufficient to establish subject matter jurisdiction. In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 984-85 (9th Cir. 2008). A defendant can challenge subject matter jurisdiction in one of two ways--through a facial attack or a factual attack. A facial attack "accepts the truth of the plaintiff's allegations but asserts that they are 'insufficient on their face to invoke federal jurisdiction.'" Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014). A factual attack "contests the truth of the plaintiff's factual allegations, usually by introducing evidence

[2] Defendants also filed identical reply briefs in response to plaintiff's opposition. (See Def. Kingdom of Harron's Reply ("Harron Reply") (Docket No. 12); Def. Gelms' Reply (Docket No. 11).) Because defendants' motions and reply briefs are the same, the court will cite only to defendant Kingdom of Harron's briefs when discussing defendants' arguments.

outside the pleadings." Id. "The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." Id.

B. Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) allows for dismissal when the plaintiff's complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The inquiry before the court is whether, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint has stated "a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

III. Discussion

The Declaratory Judgment Act authorizes "any court of the United States" to "declare the rights and other legal relations of any interested party," so long as that party presents "a case of actual controversy" within the court's jurisdiction. 28 U.S.C. § 2201(a). The Ninth Circuit has established a two-part test, often referred to as the Kearns test, to evaluate challenges to the court's subject matter jurisdiction over a plaintiff's claims for declaratory relief. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). First, the court must determine "whether there is an

actual case or controversy within its jurisdiction." Id. (citing Am. States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1994)). "Second, if the court finds that an actual case or controversy exists, the court must decide whether to exercise its jurisdiction by analyzing the factors set out in Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942), and its progeny." Id. (citing Kearns, 15 F.3d at 143-44).

A. Whether Plaintiff's Declaratory Judgment Act Claims Present an Actual Case or Controversy

The requirement that a case or controversy exist under the first Kearns prong is "identical to Article III's constitutional case or controversy requirement." Kearns, 15 F.3d at 143. "Article III requires that there be a 'substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" Aydin Co. v. Union of India, 940 F.2d 527, 528 (9th Cir. 1991) (emphasis in original) (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)). "[T]he case must also fall under one of the foundations of federal jurisdiction." Kearns, 15 F.3d at 143 (quoting Aydin, 940 F.2d at 528).

Here, as in Kearns, plaintiff's claims fall under one of the foundations of federal jurisdiction because "jurisdiction is premised on diversity." See id. The only question, then, is whether plaintiff's claims for declaratory relief satisfy Article III by presenting a "substantial controversy of sufficient immediacy and reality." Aydin, 940 F.2d at 528.

1. Plaintiff's Duty to Defend Claims

A suit becomes moot, and "[t]here is . . . no case or

controversy . . . 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 89 (2013)).

Defendants argue that plaintiff's claims do not present a live controversy for the court to adjudicate because plaintiff already elected not to defend Kingdom of Harron in the underlying action before filing suit. (See Harron Mot. to Dismiss at 6.) According to defendants, plaintiff's claims therefore seek an advisory opinion indicating that plaintiff's prior refusal to defend Kingdom of Harron was proper, rather than a declaration that would aid plaintiff in shaping future conduct. (See id. (citing Britz Fertilizers, Inc. v. Bayer Corp., 665 F. Supp. 2d 1142, 1173 (E.D. Cal. 2009) (Wanger, J.)).)

In Aetna Cas. & Sur. Co. v. Merritt, 974 F.2d 1196, 1199-1200 (9th Cir. 1992), the plaintiff insurance company, Aetna, refused a request by its insured to defend him in a personal injury action in California state court. Merritt, 974 F.2d at 1198. Aetna filed a complaint in federal court seeking a declaration that it owed no duty to defend or indemnify the insured based on the terms of the insurance policy. See id. The Ninth Circuit held that the district court had properly asserted jurisdiction over Aetna's claims for declaratory relief. See id. at 1199 ("We know of no authority for the proposition that an insurer is barred from invoking diversity jurisdiction to bring a declaratory judgment action against an insured on an issue of coverage.").

In Kearns, 15 F.3d at 143-45, the court similarly held

that a declaratory judgment action initiated by an insurer regarding its duty to defend and indemnify its insured in an underlying state court action presented a "case or controversy" capable of adjudication by a federal district court. See Kearns, 15 F.3d at 144. Seeking to clarify prior decisions regarding whether an actual case or controversy exists in the context of insurance coverage disputes, the Ninth Circuit rejected as dictum a statement from a prior case that "there may not be a case or controversy" in a declaratory judgment action disputing a duty to defend. See id. (citing Cont'l Cas. Co. v. Robsac Indus., 947 F.2d 1367, 1371-72 (9th Cir. 1991)). The court then explicitly reaffirmed its holding in Merritt that a declaratory judgment action regarding an insurer's duty to defend and indemnify presents a "case or controversy" under Article III and the Declaratory Judgment Act. See id. (citing Md. Cas., 312 U.S. at 273).

Here, plaintiff has also brought an action for a declaratory judgment regarding its duty to defend and indemnify defendant Kingdom of Harron in the underlying state court action. (See generally Compl.) Like the plaintiffs in Kearns and Merritt, plaintiff here "seeks a declaration regarding its obligations in the pending state court liability suit against" Kingdom of Harron. See Kearns, 15. F.3d at 144. Plaintiff's claims do not involve wholly past conduct, because according to the allegations of the Complaint and the representations of counsel at the oral argument on this motion the underlying action is still ongoing. Counsel represent that a default has been entered against the Kingdom of Harron in the underlying action

but that judgment has yet to be entered upon that default.

Based upon those representations, if this court declares plaintiff has a duty to defend, it still presumably fulfill that duty from this point forward by undertaking the defense and moving to set aside the default. See Merritt, 974 F.2d at 1199. This court, of course, expresses no opinion on how the state court might rule on such a motion. Thus, under controlling Ninth Circuit precedent, plaintiff's claims for declaratory relief as to its duty to defend present a substantial controversy that is sufficiently immediate and real so as to satisfy Article III's case or controversy requirement. See Kearns, 15. F.3d at 144; Merritt, 974 F.2d at 1199; see also Progressive Cas. Ins. Co. v. Dalton, No. 2:12-CV-00713 MCE, 2012 WL 6088313, at *5 (E.D. Cal. Dec. 6, 2012) ("[C]ourts have 'consistently held that a dispute between an insurer and its insureds over the duties imposed by the insurance contract [to defend and indemnify] satisfies Article III's case and controversy requirement.'" (quoting Gov't Emp. Ins. Co. v. Dizol, 133 F.3d 1220, 1222 n.2 (9th Cir. 1998))).

Defendants' argument that this case is distinguishable from Kearns and Merritt is without merit. Defendants contend that Merritt differed from this case because, at the time the insurer in that case filed its complaint for declaratory relief in federal court, "no parallel state court proceeding existed, and once the state court action was filed it was stayed pending resolution of the [federal case]." (See Harron Reply at 4.) Defendants argue that the plaintiff in Merritt was therefore seeking a declaration as to its obligations in a future

proceeding, rather than one that was already underway and for which it had already disclaimed coverage, as is the case here. (See id.) However, the parallel state court proceeding in Merritt that defendants assert had not yet begun was a parallel suit for declaratory relief filed by the insured in state court. See Merritt, 974 F.2d at 1198. As in this case, the underlying state court action for damages against the insured in Merritt was already pending at the time the insurer filed its federal complaint. See id.

Defendants argue that Kearns does not govern this case because, there, the insurer agreed to defend the insured in the underlying state court action subject to a full reservation of rights before filing suit in federal court. (See Harron Reply at 4.) However, defendants do not show that this distinction carries any legal significance. Defendants do not cite to any Ninth Circuit case law that indicates that an insurer must agree to defend an insured in an underlying state court action for a live case or controversy to arise. Defendants also overlook the fact that the insurer in Merritt had refused to defend its insured in the underlying state court proceeding for damages, just as plaintiff did here. See Merritt, 974 F.2d at 1199.

Finally, defendants argue that plaintiff's claims for declaratory relief as to its duty to defend are improper because an action for declaratory relief must act prospectively "to enable the parties to shape their conduct so as to avoid a breach." (See Harron Mot. to Dismiss at 5-8.) Defendants primarily rely on Britz Fertilizers, Inc. v. Bayer Corp., 665 F. Supp. 2d 1142 (E.D. Cal. 2009) (Wanger, J.). In Britz, the court

held that a claim for declaratory relief as to whether the plaintiff, Bayer, was obligated to provide an adequate defense under its contract with Britz was improper because it sought "only to address 'past wrongs' in connection with the [underlying] litigation." See Britz, 665 F. Supp. at 1173.

However, Britz is distinguishable from this case for two reasons. First, the plaintiff in Britz was the defendant in the underlying state court litigation, and was requesting a declaration that another party, Bayer, owed it a defense and indemnification in the underlying action. See Britz, 665 F. Supp. at 1173. Second, the underlying action in Britz had already concluded by the time the plaintiff filed its action for declaratory relief. Id. Britz held that the plaintiff's claim for declaratory relief was improper because the plaintiff already had a "fully matured cause[] of action" for monetary relief when it filed its federal complaint. Id. Plaintiff's declaratory relief claim would therefore be a "superfluous second cause[s] of action for the determination of identical issues" rather than a tool to "enable the parties to shape their conduct as to avoid a breach." Id. (internal citations omitted).

Here, in contrast, plaintiff Evanston is not a party to the underlying action, but rather the insurer from whom the defendant in the underlying action seeks defense. Plaintiff's claims for declaratory relief are therefore not duplicative or superfluous of any claims for monetary relief because it is Kingdom of Harron, not plaintiff, who will potentially have a claim for breach of contract based on plaintiffs' refusal to defend it in the underlying action. See id. Because the

underlying action here is still ongoing, plaintiff's claims for declaratory relief will help it "shape its conduct" so as to avoid breach: if the court finds that plaintiff does owe Kingdom of Harron a duty to defend under the Evanston policy, plaintiff could still defend Kingdom of Harron before the underlying action is resolved. See id.[3]

[3] Defendants also cite to a number of other cases from the Eastern District of California, most of which simply restate the same general rule articulated in Britz that declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs. (See Harron Mot. to Dismiss at 6-7.) Most of these cases simply state the same general rule articulated in Britz that declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs. See, e.g., C & C Props., Inc. v. Shell Co., No. 1:14-cv-01889 JAM JLT, 2015 WL 5604384, at *8-9 (E.D. Cal. Sep. 23, 2015) (seeking declaratory relief for trespass claim). The only case cited by defendants that involves an insurance company's duty to defend and indemnify, Public Service Mutual Insurance Co. v. Liberty Surplus Insurance Co., 51 F. Supp. 3d 937 (E.D. Cal. 2014) (England, J.), also holds that the plaintiff's claims for declaratory relief would be superfluous of its other claims for damages that had already matured and is thus distinguishable for the same reason as Britz. See Public Service, 51 F. Supp. at 950.

Defendants also point to a number of cases from other states that have held that "declaratory relief cannot be used by an insurer to seek a court's advisory validation of its prior denial of coverage." (See Harron Mot. to Dismiss at 7-8.) Not only do many of these cases involve situations in which the underlying action had already concluded by the time the plaintiff filed its suit for declaratory relief, see, e.g., Mid-Century Ins. Co. v. Estate of Morris ex. rel. Morris, 966 N.E. 2d 681 (Ind. Ct. App. 2012); Morgan v. Guaranty Nat. Cos., 489 S.E.2d 803 (Ga. 1997), these cases appear to be inconsistent with binding Ninth Circuit precedent that has held that a district court may assert jurisdiction over a claim seeking a declaration that the insurer did not err in denying a defense to the insured in the underlying action. See Merritt, 974 F.2d at 1199. Out of circuit state court decisions also do not lend much insight as to whether a federal court has subject matter jurisdiction over a claim before it.

Accordingly, because plaintiff's claims for declaratory relief as to plaintiff's duty to defend Kingdom of present a "case or controversy" under Kearns and Merritt. See Kearns, 15. F.3d at 144; Merritt, 974 F.2d at 1199, the court has subject matter jurisdiction over plaintiff's First and Second Claims for Relief and that plaintiff has successfully stated claims upon which relief can be granted. See Kearns, 15. F.3d at 144; Twombly, 550 U.S. at 570.

2. Plaintiff's Duty to Indemnify Claims

In order for plaintiff's claims to be ripe for adjudication under Article III, they must present a "substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Aydin, 940 F.2d at 528 (quoting Md. Cas., 312 U.S. at 273.

As with plaintiff's duty to defend claims, Kearns and Merritt are again instructive. See Kearns, 15. F.3d at 144; Merritt, 974 F.2d at 1199. Both cases involved insurers seeking declaratory relief as to their duty to defend and indemnify their insured against underlying state claims, and, contrary to defendants' assertions, there is no indication in either of those cases that the court intended to cabin its holding that jurisdiction was proper only to claims concerning the duty to defend. See Kearns, 15. F.3d at 144; Merritt, 974 F.2d at 1199.

In fact, Kearns explicitly stated that Merritt had "held that in a declaratory judgment action brought to determine a duty to defend or indemnify, the court may exercise jurisdiction." See Kearns, 15. F.3d at 144 (emphasis added). The court then added that it was reaffirming Merritt's holding in

part because of the Supreme Court's decision in Maryland Casualty v. Pacific Coal & Oil, in which the Court "held that an insurer's declaratory judgment action regarding its duty to defend and indemnify was sufficiently ripe, even when the underlying liability action in state court had not yet proceeded to judgment." See id. (citing Md. Cas., 312 U.S. at 270). Because Kearns explicitly held that a claim for declaratory relief as to an insurer's duty to indemnify its insured in underlying state court proceedings presents "a case or controversy," plaintiff's claims seeking a declaration as to its duty to indemnify Kingdom of Harron are sufficiently ripe for adjudication. See id.

Defendants cite to Yellowstone Development, LLC v. United Fire & Casualty Co., No. CV 11-12 BU CSO, 2011 WL 13077970 (D. Mont. Aug. 11, 2011) and Western Interntional Syndication Co. v. Gulf Insurance Co., No. CV 04-2349 RGK JWJ, 2004 WL 5573919 (C.D. Cal. Dec. 20, 2004), as examples of cases in which district courts in the Ninth Circuit have held that a claim for a declaration as to an insurer's duty to indemnify was not ripe for adjudication because the claim had not "taken on a fixed and final shape so that a court can see what legal issues it is deciding." See Yellowstone, 2011 WL 13077970, at *3 (citing N. Cty. Commc'n Co. v. Cal. Catalog & Tech., 594 F.3d 1149, 1154 (9th Cir. 2010)).

Defendants do not articulate why plaintiff's duty to indemnify claims in this case are too nebulous or unfixed for the court to "see what legal issues it is deciding" prior to the conclusion of the underlying action, beyond merely asserting that they are claims seeking a declaration as to plaintiff's duty to

indemnify. (See id.) The court is not persuaded that plaintiff's duty to indemnify claims are not ripe. See Kearns, 15 F.3d at 144 (citing Md. Cas., 312 U.S. at 270). The court is instead persuaded by those cases in which district courts have found that, under Kearns, claims for declaratory relief as to an insurer's duty to indemnify an insured in an underlying action that is still pending are sufficiently ripe for review. See, e.g., Dalton, 2012 WL 6088313, at *5-6 (citing Kearns, 15 F.3d at 144) ("That a defendant's liability may be contingent does not necessarily defeat jurisdiction of a declaratory judgment action, and the Act allows a plaintiff to bring a claim in certain cases of unresolved contingencies.").[4]

The court therefore finds that it has subject matter jurisdiction and that plaintiff's Third through Sixth Claims for Relief adequately state claims upon which relief can be granted. See id.; Twombly, 550 U.S. at 570.

B. Whether the Brillhart Factors Counsel Exercising Jurisdiction

Even when a plaintiff's claims for declaratory relief present the court with a "case or controversy" under Article III, the court must decide whether to exercise its discretion to

[4] The remainder of the cases upon which defendants rely either do not involve claims for declaratory relief as to an insurer's duty to indemnify, or address whether declaratory relief for duty to indemnify claims is appropriate in California state court. (See Harron Reply at 6-7.) None of these cases contradict the Ninth Circuit's holding in Kearns that claims for declaratory relief as to an insurer's duty to indemnify are sufficiently ripe for review, even when the underlying action has not yet concluded. See Kearns, 15 F.3d at 144.

assert jurisdiction over those claims by analyzing the factors set out in Brillhart. Principal Life, 394 F.3d at 672 (citing Kearns, 15 F.3d at 143). The Brillhart factors, which are non-exclusive, state that "(1) the district court should avoid needless determination of state law issues; (2) it should discourage litigants from filing declaratory actions as a means of forum shopping; and (3) it should avoid duplicative litigation." Id. (quoting Gov't Emp. Ins. Co. v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998)).

"Essentially, the district court 'must balance concerns of judicial administration, comity, and fairness to the litigants.'" Id. (quoting Kearns, 15 F.3d at 144). Other considerations the court may take into account are whether the declaratory action "is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata' advantage, and whether the use of a declaratory action "will result in entanglement between the federal and state court systems." Dizol, 133 F.3d at 1225 n.5.

1. Determination of State Law Issues

In considering first Brillhart factor, courts often examine whether adjudicating the declaratory judgment action will require the determination of novel questions of state law. Dalton, 2012 WL 6088313, at *7 (citing Carolina Cas. Ins. Co. v. Bolling, Walter & Gawthrop, No. Civ. S-04-2445 FCD PAN, 2005 WL 1367096, at *5 (E.D. Cal. May 31, 2005)); N.E. Ins. Co. v. Masonmar, Inc., No. 1:13-cv-00364 AWI SAB, 2013 WL 2474682, at *3 (E.D. Cal. Jun. 7, 2013).

The present case will require the court to determine

whether the Evanston policy provides coverage for a suit against Kingdom of Harron seeking damages for personal injuries to Gelms that occurred during Gelms' participation in activities at the Fair. (See Compl. ¶¶ 22-24.) "While the interpretation of an insurance policy 'is governed by state law, the principles of contract interpretation are well settled, and [a federal district] court is an appropriate forum to adjudicate [the] matter.'" Dalton, 2012 WL 6088313, at *7 (alterations in original) (quoting Mitsui Sumitomo Ins. Co. of Am. v. Delicato Vineyards, No. CIV. S-06-2891 FCD GGH, 2007 WL 1378025, at *6 (E.D. Cal. May 10, 2007)).

California law regarding an insurer's duty to defend and indemnify is well-defined. See Burgett, Inc. v. Am. Zurich Ins. Co., 830 F. Supp. 2d 953, 959 (E.D. Cal. 2011) (England, J.) (summarizing California law regarding the duty to defend); Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal. 4th 945, 958 (Cal. 2001) (summarizing California law regarding the duty to indemnify). Construing plaintiff's claims is unlikely to involve novel state law issues. See Sumitomo, 2007 WL 1378025, at *6 (holding that determination of whether insurance policy covered spoilage of wine due to heat wave did not require the court to determine novel questions of state law); Dalton, 2012 WL 6088313, at *7 (holding that determination of whether directors & officers insurance policy provided coverage for corporate losses "should involve a relatively straightforward analysis of the policy, without infringing on novel state law issues").

Accordingly, the first Brillhart factor weighs in favor

of the court retaining jurisdiction. See Principal Life, 394 F.3d at 672.

2. Discourage Forum Shopping

The second Brillhart factor counsels district courts to disclaim jurisdiction if doing so would "discourage litigants from filing declaratory actions as a means of forum shopping." Principal Life, 394 F.3d at 672. "This factor is usually understood to favor discouraging an insurer from forum shopping, i.e., filing a federal court declaratory action to see if it might fare better in federal court at the same time the insurer is engaged in a state court action." Am. Cas. Co. v. Krieger, 181 F.3d 1113, 1119 (9th Cir. 1999). This factor relates to "the defensive" or "reactive" nature of a federal declaratory judgment suit. Robsac, 947 F.3d at 1372 (overruled on other grounds). "A declaratory judgment action by an insurance company against its insured during the pendency of a non-removable state court action presenting the same issues of state law is an archetype of what we have termed 'reactive' litigation." Id.

Here, it does not appear that plaintiff has engaged in forum shopping by filing this action. Plaintiff is not a party to the underlying action for personal injuries against Kingdom of Harron, and there does not appear to be any suit filed by defendants in state court regarding the coverage issues contained in plaintiff's complaint (Compl. ¶¶ 22-48). Accordingly, nothing indicates that plaintiff brought this action to see if it would "fare better in federal court at the same time [it was] engaged in a state court action." See Krieger, 181 F.3d at 1119; Dalton, 2012 WL 6088313, at *8 ("All parties acknowledge that the FDIC

has yet to file a lawsuit in state court, demonstrating both that Progressive is not a party in an underlying lawsuit and that the coverage issues before the Court are not being litigated in any other forum."); Masonmar, 2013 WL 2474682, at *3 (holding that there was no suggestion plaintiff had engaged in forum shopping where plaintiff was not a party to the underlying state court action).

Defendants contend for the first time in their reply brief that plaintiff's action for declaratory relief was "reactive" because plaintiff was aware when it filed its action that Kingdom of Harron was in default in the underlying action and that Gelms would likely (1) seek a default judgment and (2) file an action in state court against Kingdom of Harron and plaintiff to enforce the default judgment. (See Harron Reply at 12.) Defendants assert that because a threat of future state court litigation involving the same issues of coverage and indemnification at issue in plaintiff's suit existed when plaintiff filed its suit, plaintiff's suit should be considered reactive and the court should refuse to assert jurisdiction. (See id.)

Not only is defendants' argument waived because it was raised for the first time in defendants' reply brief, see Bazuaye v. INS, 79 F.3d 118, 120 (9th Cir. 1996), the court finds the argument unpersuasive. Courts consider declaratory judgment actions to be "reactive" when they are brought during the "pendency of a non-removable state court action presenting the same issues of state law." Robsac, 947 F.3d at 1372 (overruled on other grounds) (emphasis added); Great S. Life Ins. Co. v.

Zarate, No. C 96-4520 FMS, 1997 WL 136246, at *2 (N.D. Cal. Mar. 13, 1997) (holding that second Brillhart factor counseled against asserting jurisdiction because plaintiff's suit for declaratory relief was reactive, as it sought "declaratory relief in [federal court] regarding its obligations under state law for the same policy"). Here, plaintiff's claims brought in response to a state court action presenting different issues of state law, and they were brought five months after that suit was filed and almost three months after plaintiff disclaimed coverage for the underlying action. (See Compl. ¶¶ 22-24.)

Because Kingdom of Harron had the opportunity to file a parallel action for declaratory relief in state court as to plaintiff's duty to defend or indemnify during this time period, there is no evidence that plaintiff engaged in a "race to the courthouse" to file its action for declaratory relief before defendants could. See Dalton, 2012 WL 6088313, at *8 (finding that, because defendant "had sufficient time to file a lawsuit . . . there is accordingly no viable claim that [the insurer] participated in a race to the courthouse").

3. Avoid Duplicative Litigation

The third Brillhart factor cautions district courts to avoid exercising jurisdiction where doing so would lead to duplicative litigation. Principal Life, 394 F.3d at 672. "If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court." Id. at 1225 (citing Chamberlain v. Allstate Ins. Co., 931 F.2d 1361, 1366-67 (9th Cir. 1991)).

However, "cases . . . 'in which there are no parallel state court proceedings' lie at the 'outer boundaries' of the district court's discretion [to decline jurisdiction] under the Declaratory Judgment Act." Md. Cas. Co. v. Knight, 96 F.3d 1284, 1289 (9th Cir. 1996) (citing Wilton v. Seven Falls Co., 515 U.S. 277, 289 (1995)).

As discussed above, the underlying state court action involves different parties and different claims than those at issue here. While the underlying action may require the state court to resolve some of the same factual issues as this case--such as whether Gelms participated in the tug of war game at the Fair and whether he was pushed off of his wooden block during that game--the two courts will use these factual determinations to resolve different legal issues. See Masonmar, 2013 WL 2474682, at *4. The state court will presumably need to determine whether Kingdom of Harron can be held liable for Gelms' injuries as a result of these facts. (See Compl. ¶¶ 18-24.) This court will have to determine whether the underlying action falls under one of the Evanston policy's stated exceptions based on the content of Gelms' allegations and claims in state court. (See Compl. ¶¶ 25-48.) Thus, at most, plaintiff's claims call for duplicative adjudication of some of the facts at issue in the underlying action, while determination of each case's legal issues will remain separate. See Masonmar, 2013 WL 2474682, at *4.

Thus, there is no parallel state proceeding in this action, and dismissing plaintiff's claims would require the court to act at the "outer boundaries" of its discretion to decline

jurisdiction. See Knight, 96 F.3d at 1289. The court therefore finds that the third Brillhart factor weighs against dismissing plaintiff's claims.

Because the three Brillhart factors weigh in favor of exercising jurisdiction, the court will assert jurisdiction over plaintiff's claims for declaratory relief. See Dizol, 133 F.3d at 1223.

IT IS THEREFORE ORDERED that defendants' motions to dismiss (Docket Nos. 6, 7) be, and the same hereby are, DENIED.

Dated: November 18, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE